MICHIGAN SUPREME COURT

LANAH HARRIS, Next Friend of WILLIAM WESLEY DEITZ, A minor, MARIAH BOGARD-DEITZ and DONALD HARRIS, JR., Plaintiffs-Appellees,

Supreme Court No: 126922 Court of Appeals No: 247253 Wayne CC No: 01-116038-NO

VS.

PAUL RAHMAN, WALTER SAKOWSKI,
Personal Representative of the Estate of
RICHARD E. RAHMAN, Deceased, COUNTY OF
WAYNE, BAKER DENTAL DIVISION,
ENGLEHARD INDUSTRIES, INC.,
TROY CHEMICAL COMPANY,
Defendants,

And

126922

HENRY MACIEJEWSKI, Defendant-Appellant.

BRIEF BY PLAINTIFF, LANAH HARRIS, IN OPPOSITION TO HENRY MACIEJEWSKI'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

F I L E D MAY 1 6 2005

CORBIN R. DAVIS CLERK MICHIGAN SUPREME COURT ROBERT J. DINGES & ASSOCIATES

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ORDERS APPEALED AND RELIEF SOUGHT

Henry Maciejewski is seeking relief to appeal from the following Orders:

- 1. The July 22, 2004 judgment of the Court of Appeals affirming the trial court.
- 2. The Order dated February 19, 2003 by the Wayne County Circuit Court denying

Mr. Maciejewski's Motion for Summary Disposition based on immunity grounds.

Plaintiff, Lanah Harris, request that this court:

- 1. Deny leave to appeal because there are no significant legal issues involved.
- 2. Remand this case to the Wayne County Circuit Court for trial.

Statement of Material Proceedings

QUESTIONS PRESENTED FOR REVIEW

1. IN LIGHT OF THE DOCUMENTARY EVIDENCE AND DEPOSITION TESTIMONY, IS THERE A GENUINE ISSUE OF DISPUTED MATERIAL FACT REGARDING WHETHER THE DEFENDANT KNEW THAT THERE WAS A LARGE QUANTITY OF MERCURY INVOLVED OR WHETHER THE DEFENDANT'S STATEMENTS DIRECTLY CONTRADICTED THE ADVICE OF THE POISON CONTROL CENTER.

Plaintiff Answers:

Yes

The Trial Court Answered:

Yes

The Court of Appeals Answered:

Yes

Mr. Maciejewski Answered:

No.

2. IN LIGHT OF THE DEFENDANT'S MASTERS DEGREE IN INDUSTRIAL TOXICOLOGY AND IN LIGHT OF HIS EXPERIENCE WITH TOXIC MERCURY, COULD A REASONABLE JURY CONCLUDE THAT HIS CONDUCT AMOUNTED TO RECKLESS CONDUCT SHOWING HIS SUBSTANTIAL LACK OF CONCERN AS TO WHETHER INJURY WOULD RESULT?

Plaintiff Answers:

Yes

The Trial Court Answered:

Yes

The Court of Appeals Answered:

Yes

Mr. Maciejewski Answered:

No

3. ASSUMING GROSS NEGLIGENCE ON THE PART OF THE DEFENDANT, DO HIS ACTIONS CONSTITUTE THE PROXIMATE CAUSE OF THE INJURIES AS REQUIRED BY MCL 691.1407 (2)(c)?

Plaintiff Answers:

Yes

The Trial Court Answered:

Yes

The Court of Appeals Answered:

Yes

Mr. Maciejewski Answered:

No.

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STATEMENT OF MATERIAL PROCEEDINGS

Defendant, Henry Maciejewski (Mr. Maciejewski or Defendant), a government employee, sought Summary Disposition under MCR 2.116 (c)(6)(7) & (10). The trial court denied summary disposition indicating that there were genuine issues of disputed material fact. **EXHIBIT 1.**

Mr. Maciejewski appealed to the Court of Appeals and made the same arguments. ¹ The Court of Appeals affirmed the trial court decision. **EXHIBIT 2.**

In his Application for Leave to Appeal, the Defendant presented two arguments.

First, he argued that there was insufficient evidence of gross negligence. Defendant argued on page 19 of his Application for Leave to Appeal that Lanah Harris never informed Mr.

Maciejewski "that one pound of mercury was involved." In terms of whether Mr.

Maciejewski's statements to Lanah Harris directly contradicted the advice of the Poison

Control Center, the Defendant argued in his Application, page 21, that the Harris family had already returned to the house when Mr. Maciejewski spoke to Lanah Harris.

Regarding "the" proximate cause issue, Defendant argued that "all these events happened before Ms. Harris even contacted Mr. Maciejewski." Id, 13. According to the Defendant, he did not leave the bottle of mercury in the Colombia street house, did not open the bottle and pour it on the bodies, did not carry and spill the mercury throughout the house, did not put a cigarette in the mercury and have the children smoke it, and did not make the decision for the family to reenter the house contrary to the explicit direction of Poison Control. Id, 16.

¹ Defendant never suggested to the Court of Appeals that the trial court committed error by switching the burden of proof. The "burden of proof" argument by Defendant is discussed on pages 14-17 of his Application for Leave to Appeal. Since this issue was not addressed by this Court's Order of April 15, 2005, and since the Defendant failed to preserve this argument with the Court of Appeals, it is presumed that no argument is necessary on this issue.

This court granted leave for oral argument. The specified issues are (1) the necessity of documentary evidence regarding Defendant's knowledge of the quantity of mercury or whether his statements directly contradicted the instructions to vacate the house, (2) could a reasonable juror conclude gross negligence, and (3) was the alleged gross negligence "the" proximate cause of the injuries? **EXHIBIT 3**. Defendant's Application for Leave to Appeal never raised the issue of "documentary evidence" and this issue was never briefed before the trial court or the Court of Appeals.

Regarding the claim of gross negligence, the Court of Appeals stated:

"Plaintiff presented evidence that: (1) defendant knew at the time of the spill at the Harris home that the amount of mercury involved in a spill was an important factor because the greater the spill the greater the danger of vaporization and, therefore, poisoning; (2) before the time of the spill at the Harris home, defendant believed that when on pound of elemental mercury was involved in a spill immediate evacuation of the contaminated area was necessary; (3) defendant was informed during his first conversation with Lanah Harris that one pound of mercury was involved and that the Poison Control Center had advised the family to evacuate the home; (4) although defendant's testing had revealed levels of mercury contamination within the legal limits for industrial sites, this legal limit was higher than was safe in a residential area because it was based on time of exposure; (5) and that defendant had recommended that the Harris' keep their family pets away from the most heavily contaminated areas for the safety of the pets. Plaintiff further presented evidence that, despite all of the above, not only did defendant not advise the Harris family to evacuate the home, but he directly contradicted the advice given the family by the Poison Control Center in telling them that it was mere speculation that the levels of mercury in the home were dangerous. Upon review de novo, we find that the trial court correctly determined that a genuine issue of material fact exists as to whether defendant was grossly negligent in connection with the injuries suffered by plaintiff's children and, thus, the claim is not statutorily barred by governmental immunity. **EXHIBIT 2, 3-4.**

Regarding whether Defendant's conduct amounted to the proximate cause of the injuries, the Court of Appeals stated:

"Defendant argues that his conduct, regardless whether it constituted gross negligence, was not the proximate cause of plaintiff's children's injuries, as the term 'proximate cause' is defined in *Robinson*, *supra*. Specifically, defendant asserts that he could not be the proximate cause of the injuries sustained by plaintiff's children because their injuries were complete before plaintiff even contacted defendant. However, as the trial court noted, defendant has provided no evidence to show that injuries sustained

by plaintiff's children were complete upon their initial exposure to the mercury. Defendant has provided no doctor's reports, no deposition testimony, no affidavits, and no scientific treatises or any other type of documentary evidence to support this contention. Without such evidence, defendant has not shown that the children's continued exposure to the mercury in their home, the direct result of defendant's allegedly grossly negligent failure to advise the Harris family to evacuate the home, did not cause some or all of the injuries sustained by plaintiff's children. See *Smith*, *supra* at 455. Because defendant did not make the required showing, we find, upon review de novo, that he failed to demonstrate that no genuine issue of material fact exists as to the element of proximate cause. Therefore, the trial court did not err in denying defendant's motion for summary disposition." <u>Id</u>, 4.

STATEMENT OF MATERIAL FACTS

There is documentary evidence of gross negligence. The documentary evidence comes from the Poison Control Center at Children's Hospital. On July 1, 1998 at 2:52 p.m. Lanah Harris called the Poison Control Center. The call was taken by Leo Posada (a poison control specialist) and he made a business record of the call. **EXHIBIT 4**.

"Hx: teenagers found bottle of hg (caller approximates 1 lbs.) proceeded to play with beads throughout home, scattering mercury in bathroom, bedroom situated in the basement and living room. . .

P: contact environmental clean-up company, contact health dept. # given. Stay out of house."

As a result of the first call to the Poison Control Center, the Harris family moved out of the house and pitched a tent in the backyard. **Deposition, Lanah Harris, 162**;

EXHIBIT 5

On July 2, 1998 at 1:38 p.m. there was a second call to the Poison Control Center.

Again, a business entry was made by Susan Smolinske from the Poison Control Center.

"Call to Lanah. Has called Health Dept. They will come out and measure mercury levels next Tuesday, 7-7." **EXHIBIT 4.**

Mr. Maciejewski admitted that his first telephone conversation with Lanah Harris took place on July 2, 1998. **Depositon, Henry Maciejewski, 20; EXHIBIT 6.** Mr. Maciejewski failed to keep a log of the July 2, 1998 telephone conversation and, as it turned out, he failed

to maintain any record of any kind regarding his involvement in the Colombia street mercury spill. <u>Id.</u> 13-17; <u>See</u>, SJI 2d. 6.01.

Lanah Harris' deposition testimony regarding the first telephone conversation with Mr. Maciejewski is as follows:

"A. I don't know what date it was, but I got a hold of Mr. Hank and he said that he needed to see about getting a meter. And he explained to me what the meter would do, because first you have to decide if there is a problem and the meter would measure if there's a problem. And he said he had to borrow one, Wayne County didn't have one. So he had a difficult time getting hold of that. So we just stayed there waiting to hear more about that, whether, you know – I didn't know if we were – if there was a big problem, if – you know, I didn't know a lot about mercury at that point. I was just starting to get enlightened." Lanah Harris Dep., 163-164.

Lanah Harris described the substance of the conversation as follows:

- Q. Did Mr. Hank we'll refer to him as Hank, because I can't get my tongue around that Polish name and I don't mean to be insulting, but it's difficult. Did he tell you any steps that you should take?
- A., First step was to get hold of that meter to measure, and he had to work on getting that specialized equipment he explained and that it had to be charged.
- Q. Did you tell him when you talked to him that the Poison Control had told you to get out of the house?
- A. Yeah. I said we waited in the yard. I thought somebody was going to show up here.
- Q. What did he say to that?
- A. He says well, you really can't be sure about something until we get a meter in there. I mean, he just he would be speculating.

. . .

Q. Did you tell him that the material was sitting in your kitchen cupboard?

. . .

- A. My husband locked it in a locking tool cabinet in the garage.
- Q. Did you tell Hank that whatever this substance is that my kids I think got a hold of, is sitting locked up in a locked part of the garage if you want to come over and look at it?
- A. ... I said my husband put it away for safety.
- Q. So you told Hank that you had seen the substance on the floor, that you had cleaned it up with playing cards. Did you tell him anything else?
- A. I just told him what I was aware of, what I could see in the house and what I wasn't. You know, I mean wasn't seeing anything else. What should I expect. He said that it volatizes at 70 degrees and becomes a poisonous gas that you cannot smell." <u>Id</u>, 169-171.

The substance of the first three telephone conversations between Lanah Harris, Poison Control Center, and Wayne County Health Department is as follows: (1) Poison Control advised Lanah Harris to move out, (2) Mr. Maciejewski advised Lanah Harris to stay at the house until testing was performed, and (3) after talking to Mr. Maciejewski, the Harris family moved back into the house or stayed in the house and waited for him to arrive and perform testing.

There is a factual dispute regarding the "amount" of the mercury spill. Mr. Maciejewski testified that he could not remember if Lanah Harris, during the first telephone conversation, stated the amount of the mercury that was spilled. Maciejewski Dep., 20. However, Mr. Maciejewski acknowledged that the "amount" of the spill is directly related to the potential health hazard. *Id., 20-21*. In other words, the greater the amount spilled, the

greater the health hazard. Mr. Maciejewski admitted during his deposition testimony that he would normally make an inquiry about the "amount" spilled.

- "Q. For example, if I were the caller and I was to say my children found some mercury.....would you inquire of me, "Well how much did they find."
- A. Yes
- Q. Okay, and you would want to get that information as quickly as possible.
- A. Yes." *Id.,173.*

There is also a factual dispute regarding "when" Mr. Maciejewski said he would come to the Columbia Street property and begin the testing. According to Lanah Harris, he promised to begin the testing on July 7. See, Exhibit 4. According to Mr. Maciejewski, he informed Lanah Harris that Wayne County Public Health did not have a meter for testing mercury and she should contact a private environmental company. *Id., 21.* However, Mr. Maciejewski admitted that a second telephone call from Lanah Harris took place on July 13 or 14, 1998 and, as a result, he promised to test the house. <u>Id., 142-144.</u>

According to Donald Lawrenchuck, M.D. Medical Director for Wayne County Department of Health, the lack of a mercury vaporizer did not pose any problem. Mr. Lawrenchuck testified that such meters were readily available through a number of sources. Deposition of Donald Lawrenchuck, M.D., 32-34. EXHIBIT 7.

According to Mr. Maciejewski, after he obtained a mercury vaporizer from Wayne State University, there was further delay because of the battery and sensor. Thus, according to Mr. Maciejewski, charging the battery took place for 2/3 days and then there was a weekend and then more charging took place the first part of the following week. Maciejewski Dep., 31-38, 145-150.

The precise date of the mercury testing of the Columbia Street property is also a factual dispute. According to Lanah Harris, the initial mercury testing took place

approximately 2 weeks after the initial conversation with Mr. Maciejewski. This places the testing at on or about July 16, 1998. Lanah Harris Dep., 176-177, 180-181.

In the meantime, Mr. Maciejewski prepared no notes or records of any of his activities, including this long delay in obtaining and perfecting the equipment.

There may be a reason why Mr. Maciejewski retained no notes or records. On July 15, 1998, blood specimens were obtained from the Harris children at Genesys Medical Center. The blood samples were then sent to a lab, Quest Diagnostics, for analysis. The blood mercury levels were then reported on July 19, 1998. **See, EXHIBIT 10**. The blood test revealed extremely high levels of mercury in the blood for Donald Jr., Mariah and William

Mr. Maciejewski testified that the air sampling took place on Tuesday, July 21.

Maciejewski Dep., 139. The lab results must have been known by that date. Mr. Maciejewski admitted that, had he known of the mercury blood levels, his course of action would have been different. Maciejewski Dep., 52, 204-205.

Mr. Maciejewski is a trained toxicologist with a Master's Degree in Industrial Toxicology. Maciejewski Dep, p. 6. In addition, he has considerable experience with mercury spills. He testified that he has been involved with numerous mercury spills over the years. <u>Id</u>, 27-28, 165-166.

For example, in 1990, Mr. Maciejewski was involved in a mercury spill at a Wayne County Parochial School. The spill involved a one-pound container of mercury that a youngster had removed from a dentist's office. <u>Id</u>, 162, 164-166, 179-182, 203-205. In Mr. Maciejewski's opinion, there were problems with the response by the Wayne County Department of Public Health. As a result, Mr. Maciejewski and Bruce Davis wrote an article about the "<u>Mercury Spill Incident</u>." Exhibit 8. Mr. Maciejewski wrote that an "emergency response procedure for such problems" was needed and that the school should have been

"immediately closed." In terms of obtaining the initial information about a mercury spill, Mr. Maciejewski's proposed Draft Protocol stated:

"(1) Obtain as much information on who, what, where and when by telephone. A standard, general use questionnaire should be utilized. Obtain as much background information as possible.

* * *

- (2) Advise the Environmental Health Director and Health Officer of the problem.
- (3) Equipment:
 - (a) Minimum—Jerome mercury meter (it is portable). Initially used as a detection device for immediate on-site readings....

* * *

- (4) Arrange for an immediate on-site visit.
- (5) Interviewing should be completed promptly and all suspect area ordered closed until cleared by testing." <u>Id.</u>

As indicated, in 1990, Mr. Maciejewski stated that, in the face of a spill of one pound of mercury, immediate evacuation was necessary. Mr. Maciejewski's superiors at the Environmental Health Division were Donald Larwenchuk, M.D and Stephen Tackitt. Dr. Lawrenchuk testified that, faced with information that indicated or suggested a one-pound spill of mercury in a residential dwelling, the house should be immediately vacated. Dr. Lawrenchuk testified as follows:

- "Q. If you knew as the medical director of the Department of Public Health as early as July 2nd of 1998 that one pound of elemental mercury had been spilled in this residential dwelling and it had been spread throughout large portions of that house, would you instruct, based upon a phone call from a citizen, that the occupants of that private residential dwelling immediately vacate those premises?
- A. Absolutely, if that was a viable option for them. But more importantly, we would recommend that the

environment be tested and that the persons living in the environment be tested as quickly as possible to do an assessment, to do an on-site assessment." Deposition, Donald Lawrenchuk, M.D., 44; EXHIBIT 7.

Stephen Tackitt, supervisor for the Division of Environmental Health in 1998, gave similar testimony.

- "Q. Would a spillage of one pound of elemental mercury in a residential dwelling be sufficient to trigger an expert such as Mr. Maciejewski, in your opinion, to recommend that the family get out of that house?
- A. If it was one pound, I would say, yes, that's probably would be the recommendation."
 Deposition, Stephen Tackitt, 32-33; EXHIBIT 9.

ARGUMENT

I. THERE ARE GENUINE ISSUES OF DISPUTED MATERIAL FACT
REGARDING WHETHER THE DEFENDANT KNEW OR SHOULD
HAVE KNOWN THAT THERE WAS A LARGE QUANTITY OF
MERCURY INVOLVED AND WHETHER THE DEFENDANT
PROVIDED INFORMATION THAT DIRECTLY CONTRIDICTED THE
ADVICE OF THE POISON CONTROL CENTER

The sequence of events is as follows: On July 1, 1998 Lanah Harris spoke to the Poison Control Center and she was instructed to move out of the house. As a result, the Harris family moved out of the house. On July 2, 1998 there was a telephone discussion with Mr. Maciejewski from the Wayne County Health Department. According to Lanah Harris, she told Mr. Maciejewski that the Poison Control Center instructed the family to move out of the house and he said, in substance, that the health risks were speculative until testing was performed. At that point, the Harris family either moved back into the house or, if they had already moved back into the house, they stayed in the house. On July 2, 1998 there was a second telephone conversation with the Poison Control Center and the record of the

telephone conversation indicates that contact was made with the Wayne County Health Department and testing was scheduled on July 7, 1998.

It is undisputed that Mr. Maciejewski is an expert toxicologist with a Masters Degree. Consequently, it is undisputed that he knew about the health risks associated with mercury exposure. During the initial telephone conversation with Lanah Harris on July 2, 1998 Mr. Maciejewski told her that mercury vaporizes at room temperature and becomes toxic. Lanah Harris Dep., 171.

In sum, by July 2, 1998 Mr. Maciejewski knew the following: (1) that the children spilled dental mercury at various locations at the house, (2) that mercury is very volatile and that it vaporizes at room temperature, (3) that vaporized mercury presents a serious health risk, (4) that a mercury spill in an enclosed environment such as a house increases the possibility of health risk, (5) that, when presented with knowledge of a spill of a large quantity of mercury in a building, immediate evacuation was necessary.

Despite knowledge that injury was likely to occur unless immediate evacuation was taken, Mr. Maciejewski engaged in the following acts: (1) contrary to the advice by the Poison Control Center, he told the Harris family that it was okay to remain at the house until testing could occur, (2) he recommended that the Harris family retain a private environmental company when he knew or should have known that the potential cost for remediation was prohibitive, (3) he failed in a timely manner to obtain a mercury vaporizer, (4) he failed to instruct immediate evacuation of the house after obtaining the initial test results from the mercury vaporizer and (5) although he never instructed the Harris family to evacuate, he instructed them to move out the animals and furniture.

Mr. Maciejewski demonstrated a complete lack of concern for potential injuries. He was informed by Ms. Harris that the Poison Control Center instructed the family to move out

of the house. Mr. Maciejewski's explanation for the delay in obtaining the vaporizer is baffling and inexplicable. Mr. Maciejewski instructed Lanah Harris to remove the animals from the house, but not any persons. Mr. Maciejewski instructed Lanah Harris to remove furniture from the house, but not any persons.

The house was closed (red tagged) by the City of Dearborn on July 23, 1998. The house was closed because the results of the mercury blood levels were made known. In particular, on July 15, 1998 blood tests from the Harris children were obtained at the Genesys Medical Center in Flint. The blood samples were then sent to a lab, Quest Diagnostics, for analysis. The blood mercury levels were then reported on July 19, 1998. See, EXHIBIT 10. The blood tests reveal extremely high levels of mercury in the blood for Donald Jr., Mariah and William. Mr. Maciejewski admitted that, had he known of the mercury blood levels, his course of action would have been different. Maciejewski Dep. 52, 204.

Mr. Maciejewski has considerable experience with mercury spills. He testified that he had been involved with numerous mercury spills over the years. <u>Id</u>, 165-166.

For example, in 1990, Mr. Maciejewski was involved in a mercury spill at a Wayne County Parochial School. The spill involved a one-pound container of mercury that a youngster had removed from a dentist's office. Id, 180-183. In Mr. Maciejewski's opinion, there were problems with the response by the Wayne County Department of Public Health. As a result, Mr. Maciejewski wrote an article about the "Mercury Spill Incident." Exhibit 8. Mr. Maciejewski wrote that an "emergency response procedure for such problems" was needed and that the school should have been "immediately closed." In terms of obtaining the initial information about a mercury spill, Mr. Maciejewski's proposed Draft Protocol stated that the investigation should obtain "as much information on who, what, where and when by

telephone." He wrote that an "immediate on-site visit" should be arranged and that all "suspect area [should be] ordered closed until cleared by testing." <u>Id.</u>

The leading case on "gross negligence" for government employees under MCL 691.1407(2)(c) is Maiden v Rozwood, 461 Mich 109; 597 NW 2d 817(1999). In the companion case, Reno v Chung, the plaintiff came home and discovered that his wife and daughter were stabbed. His wife was dead, but his daughter told him about the assailant. The plaintiff told the police about the conversation with the daughter. However, the plaintiff became the leading suspect when an assistant medical examiner opined that the stab wounds to the daughter's neck made her unable to speak. Thus, the Plaintiff was charged with murder. However, the criminal case was dismissed when two experts opined that the victims neck injuries would not have prevented her from speaking. As a result, the Plaintiff sued, among others, the medical examiner.

In opposition to summary disposition, the Plaintiff offered affidavits from two experts. The affidavits indicate that Dr. Chung misunderstood the nature of the laryngeal injuries and the laryngeal function for speech. The affidavits opined that Dr. Chung should have consulted with experts in this area.

The court noted that there was "more than a mere difference of medical opinion." <u>Id</u>, 130. The medical findings and testimony by Dr. Chung were "incompetent." <u>Id</u>.

Also, Dr. Chung refused to provide records and specimens. Based on the refusal to cooperate and turn over records, the court indicated that a "reasonable inference can be drawn" in favor of the Plaintiff. <u>Id</u>, 130.

The case at bar is similar from a factual point of view to *Reno v Chung.* Mr.

Maciejewski, like Dr. Chung, is an expert. He is an Industrial Toxicologist with a Masters

Degree. Nevertheless, he testified that there were no notes made or records kept of any of his

activities. This is definitely inconsistent with professional behavior. An adverse inference in favor of Plaintiff can be drawn.

Mr. Maciejewski was incompetent. His alleged lack of knowledge of the amount of the mercury spill is further evidence of his incompetence. He testified that it was standard to determine the alleged amount of the spill. The specialist from the Poison Control Center asked Lanah Harris to read from the bottle. Mr. Maciejewski must have asked about the quantity or otherwise, he would not have said there will be testing on July 7, **EXHIBIT 4**, or, as he testified, Ms. Harris should hire a private company for testing. Mr. Maciejewski knew that this was not a case of a broken thermometer.

Mr. Maciejewski's incompetence in arranging for a Jerome meter and then charging and recharging the battery and further delaying testing is beyond ordinary negligence. His instructions to remove the animals and the furniture from the house (and not any humans) reflects a disregard for the safety of persons. Finally, even after his testing revealed high levels of mercury in the house, there was no instruction to evacuate. The lab results were made known before he tested on July 21 and the date of his telephone conversation with Dr. Suzanne White remains a mystery.

In terms of documentary evidence, there is a business record from the Poison Control Center establishing the call on July 1 and further establishing the amount of mercury involved and instruction to vacate. **EXHIBIT 4**. The business record entry from the Poison Control Center on July 2 establishes that Lanah Harris called the Wayne County Health Department and testing was scheduled on July 7. The business record entries are entirely consistent with the deposition testimony of Lanah Harris. She testified that she told Mr. Maciejewski that the Poison Control Center instructed her to vacate the house.

There is documentary evidence that Mr. Maciejewski should have asked (and probably did) about the quantity of dental mercury involved. **EXHIBIT 8**. During the first telephone conversation, Lanah Harris told Mr. Maciejewski that the materials (e.g. the bottle) were put away for safety. Thus, he knew or should have known that there was a bottle of dental mercury involved. He knew that the children spilled the mercury at various locations at the house.

There is no mention in the governmental immunity statute about the quality of evidence to establish gross negligence. There is no indication that documentary evidence is required. There is no case law that discusses a requirement of documentary evidence to establish negligence or gross negligence.

For example, there is no case law that indicates documentary evidence is required in a lawsuit against the State for an automobile accident. There is no case law that indicates documentary evidence is required to establish a highway defect.

A trial court must, of course, carefully examine the quality and quantity of the Plaintiff's proofs. The issue of the lack of documentary evidence to establish Mr.

Maciejewski's state of knowledge on July 2 may be a relevant factor. Nevertheless, the presence or lack of documentary evidence of knowledge must be weighed with all other evidence. At the summary disposition stage, it is improper to weigh the evidence.

Finally, the lack of documentation to establish Mr. Maciejewski's state of knowledge maybe deliberate. He testified that he never took notes or prepared any records of his telephone conversations with Lanah Harris even though he admitted there was a period of time when they spoke everyday. He failed to produce his notes of his telephone conversation with Dr. Suzanne White about the lab results. In short, Mr. Maciejewski was not cooperative (just like Dr. Chung).

The Plaintiff should be entitled to a favorable inference based upon Mr. Maciejewski's failure to produce relevant records or documents. In terms of whether a reasonable juror could properly find gross negligence, the trial court must carefully evaluate all the evidence including, without limitation, an adverse inference favorable to the Plaintiff because of Defendant's failure to cooperate.

II. THE ISSUE OF THE PROXIMATE CAUSE OF THE INJURIES IS A MATTER FOR A FACTUAL JUDGMENT AND BEST LEFT FOR THE JURY

The immunity statute for governmental employees states that the gross negligence of the employee must be "the proximate cause of the injury or damages." MCL 691.1407(2)(c).

In Robinson v City of Detroit, 462 Mich 439; 613 NW 2d 307 (2000) the court discussed the difference between "a" proximate cause and "the" proximate cause. The court, adopting the definition of "the" proximate cause in Stoll v Laubengayer, 174 Mich 701,706; 140 NW 532 (1913), stated that gross negligence is "the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause." Id, 462.

Robinson was a police chase case. The fleeing vehicle struck a third vehicle at the intersection. Consequently, the factual scenario in **Robinson** illustrates the difference between "a" proximate cause and "the" proximate cause.

In particular, since the police vehicle did not strike the fleeing vehicle or the third vehicle, the police vehicle was not the "direct" cause of the accident. Indeed, the police vehicle was not the most immediate or the most efficient cause of the accident. As noted in *Robinson*, the "one most immediate, efficient, and direct cause of the Plaintiffs' injuries was the reckless conduct of the drivers of the fleeing vehicle." <u>Id.</u>

This case is radically different from *Robinson*. Dental mercury (elemental mercury), as long as it remained in an enclosed bottle, did not cause any injury. Mercury can cause injury when it volatizes. Indeed, since elemental mercury volatizes at room temperature, it can be highly dangerous. Moreover, the duration of toxic mercury exposure increases the risk of health consequences.

Mr. Maciejewski argued that the injuries were complete before he was involved. In other words, Mr. Maciejewski did not leave the bottle at the Colombia street property. He did

not open the bottle. He did not pour the bottle. He did not spill the mercury throughout the house. He did not put a lit cigarette on the mercury.

This argument begs the question as to when the injuries occurred. Dr. Suzanne White, the Medical Director of the Poison Control Center, testified that there is no "timeline" for an injury because of mercury toxicity. **Deposition, Dr. Suzanne White, 31-32; EXHIBIT 11.**Dr. White further testified that mercury (a metallic liquid) vaporizes and enters the blood stream. It enters the brain fairly rapidly (within the first 24 hours or so) and penetrates the nervous system. This process can cause a neurological injury. **Id, 38-40.** She testified that "there is not much data with regard to the critical time period." **Id, 39.** She said there were no "time lines in terms of how long mercury has to reside in the brain before it has definite neurotoxicity." **Id, 40.** However, Dr. White testified that the duration of the exposure increases the potential risk of injury. **Id, 40-41.**

Defendant's Motion for Summary Disposition was obviously defective. In particular, an affidavit is necessary "when the grounds asserted do not appear on the face of the pleadings." MCR 2.116(g)(3)(a). Clearly, an affidavit from a qualified health professional was necessary to establish the Defendant's position.

The Harris family was instructed by the Poison Control Center to vacate the house on July 1, 1998. They did in fact evacuate the house. Indeed, at that point, July 1, 1998, it is highly probable that the exposure to the toxic mercury was minimal. No injuries may have occurred.

However, Mr. Maciejewski contradicted the advice from the Poison Control Center.

He told Lanah Harris that, until testing, the dangers were speculative. This lead the Harris family to return or remain inside the house.

The issue is complicated. The children knew that it was fun to play with dental mercury. However, the children had no knowledge of the dangers associated with mercury exposure.

Lanah Harris had no knowledge of mercury toxicity. She and other family members use playing cards to pick up the mercury beads and some kind of vacuum was used. After the mercury beads were picked up, she could not see the dangers.

However, Mr. Maciejewski knew the dangers. His statements to Lanah Harris were grossly incompetent and indeed his entire handling of this matter was grossly incompetent. For example, after the performed the initial testing, instead of telling Lanah Harris to get out of the house, he told her to remove some furniture and animals.

This case calls for a factual judgment regarding the behavior of the parties. In negligence cases, summary disposition is generally inappropriate because a factual judgment is required. See, e.g. Miller v Miller, 373 Mich 519; 129 NW 2d 885 (1964). The exception is when the pleadings establish as a matter of law that there is no legal duty owed. See, e.g. Locklear v Stinson, 161 Mich App 713; 411 NW 2d 834 (1987).

Proximate causation is a factual issue. A judgment call is necessary by a jury to determine the most "immediate" cause or the most "efficient" cause or the most "direct" cause.

In the case at bar, the issue of causation will require medical testimony. Plaintiff has retained two experts: Dr. John Blase and Dr. Ernest Childs.

Dr. Blase, a Neuropsycholgist, will provide testimony that mercury exposure has caused brain damage. Dr. Childs will testify that mercury exposure may have caused other medical problems.

CONCLUSION

On July 2, 1998 Mr. Maciejewski knew that the children played with dental mercury and spread it throughout the house. He knew that dental mercury comes in a bottle. He knew that mercury vaporizes at room temperature and becomes toxic. He knew the questions to ask in a mercury spill case. Lanah Harris told Mr. Maciejewski about the instruction from the Poison Control Center to vacate the house. He knew or should have known that it was dangerous to stay in the house.

There is documentary evidence about the quantity of mercury spilled and the instruction to vacate. Mr. Maciejewski's failure to document or produce records of his involvement in the Colombia street mercury spill case should not, in any event, be the legal basis for the grant of immunity. Immunity should be given to government employees who act competently and document, in a professional manner, their involvement in an event.

Mr. Maciejewski acted in a grossly incompetent manner. Had he given one piece of solid professional advise, like the specialist at Poison Control, the risk of injury could have been eliminated or substantially reduced. His advice lead the family to believe it was safe to remain inside the house.

RELIEF REQUESTED

Plaintiff, Lanah Harris, respectfully requests that this Honorable Court:

- 1. Deny the Application for Leave to Appeal.
- 2. Remand the case to the Wayne County Circuit Court for trial.

ROBERT J DINGES & ASSOCIATES

BY: ROBERT J. DINGES (P12799)